

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-002527-001 DT

06/10/2016

HONORABLE DANIELLE J. VIOLA

CLERK OF THE COURT
D. McGraw
Deputy

STATE OF ARIZONA

VANESSA MARIE LOSICCO

v.

CARY DEAN BARFIELD (001)

JONATHAN L WARSHAW

Under Advisement Ruling

Defendant Cary Barfield's Motion to Admit Entirety of Cary Barfield's
Recorded Statement With Police filed May 30, 2016 – Denied in part

State's Motion in Limine Regarding Defendant's
Recorded Statements – Denied in part and granted in part

State's Motion in Limine to Preclude Admission of Self-Serving Hearsay – Granted

Cary Barfield Statement

The Court has received and reviewed Defendant Cary Barfield's Motion to Admit Entirety of Cary Barfield's Recorded Statement With Police filed May 30, 2016.¹ The Court further considered the arguments of counsel presented on May 31, 2016. Defendant Cary Barfield asks the Court to admit the entire recorded post-arrest interview under two theories: 1) Rule 106 of the Arizona Rules of Evidence; and 2) to provide the jury with the context and circumstances surrounding the interview with Cary Barfield to assist the jury in making a

¹ None of the other Defendants filed a joinder to Cary Barfield's motion. Each of the Defendants participated in the oral argument regarding the admission of Cary Barfield's interview with police. Accordingly, the scope of this ruling is intended to address the various arguments presented by Defendants related to Cary Barfield's recorded statement.

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voluntariness determination. The Court concludes that Defendant Cary Barfield has not established why the entire interview - in fairness - ought to be considered. Additionally, Defendant has not provided any explanation as to why Defendant Barfield's statements (self-serving hearsay) reflect any overbearing, deceit, pressure, suggestion or distortion on the part of the police officers conducting the interview.

Voluntariness

None of the Defendants, including Cary Barfield, filed a motion to suppress Cary Barfield's statements to the police based on a lack of voluntariness. Defendant Cary Barfield now asks the Court to admit the entirety of the interview to allow the jury to determine whether his statements were voluntary. To the extent that Defendant Barfield or any of the other co-defendants wish to elicit evidence as to coercive tactics by the officers, they are free to do so. Cross-examination affords each defendant the opportunity to inquire into the facts and circumstances surrounding the interrogation. To the extent that the Defendants wish to offer portions of the audio which contain statements of the interrogating officers, such portions may be admissible. For example, Defendants have the opportunity to examine as to the officer's tactics, the type of questions that were asked, the content of the questions, the length of the interrogation, the setting, etc. Defendants may seek to offer portions of the audio recording that are relevant to whether a law enforcement officer used violence, coercion, or threats by any direct or implied promise, however slight. Precluding the admission of Defendant Cary Barfield's self-serving hearsay statements (i.e., his responses to questions) does not prohibit Defendants from challenging the voluntariness of the statements elicited by the State or from seeking to offer other portions of the interview to establish how the officers handled the interrogation.

Rule 106

Rule 106 of the Arizona Rules of Evidence contemplates that if a party "introduced all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part - or any other writing or recorded statement - that in fairness ought to be considered at the same time." *State v. Steinle*, 237 Ariz. 531 (App. 2016), rev. granted in part. Rule 106 protects against "the misleading impression created by taking matters out of context." Fed. R. Evid. 106 Advisory Comm. Note. Here, Defendant Cary Barfield asserts that allowing the State to cherry pick a single statement and to exclude all other statements during a 30 minute interview is inappropriate when the officers conducted an overbearing, deceit-filled interview. Defendant's argument for admitting the entire interview is based on the questions or statements by officers and the fact that Defendant denied knowledge during the interview before making inculpatory statements. For example, Defendant Cary Barfield denied certain knowledge about the "club" and later acknowledged that "years ago" he became aware that there was more than modeling going on and, he further stated "it's how they make money and how else would you

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make money. People aren't paying 40 bucks for nothing." Barfield Transcript at p. 19. Notwithstanding Defendant's denials during the interview, Defendant has not identified any portion of the interview that was taken out of context. Defendant essentially argues that he was pressured or lied to and that he made statements as a result of that pressure or those lies. "Rule 106 does not create a rule of blanket admission for all exculpatory statements simply because an inculpatory statement was also made." *State v. Cruz*, 218 Ariz. 149, 162, ¶ 58, 181 P.3d 196, 209 (2008). Here, the Court concludes that the entire recorded statement need not, in fairness, be admitted under Rule 106. To the extent that the State elicits a statement by Cary Barfield in response to a question asked by an officer during the recorded interview, however, the Defendants may require that the question also be considered.

Except as set forth above,

IT IS ORDERED, denying Defendant Cary Barfield's Motion to Admit Entirety of Cary Barfield's Recorded Statement With Police filed May 30, 2016.

State's Motion in Limine to Preclude Admission of Self-Serving Hearsay

The State seeks to preclude Defendant Cary Barfield from introducing exculpatory statements from his recorded interview. The Defendants assert that the statements of Cary Barfield should be admissible to complete the story or otherwise put Cary Barfield's comments in context due to voluntariness considerations. As described above, the Defendants will have an opportunity to cross examine the officers and can present evidence related to voluntariness without introducing Cary Barfield's self-serving hearsay. Additionally, the Court was not provided with any specific statements that were taken out of context or that otherwise – in fairness – require the totality of the interview to be considered. The Court was not presented with any other factual or legal basis upon which Cary Barfield's statements would be admissible if offered by a party other than the State.

IT IS ORDERED granting the State's Motion in Limine to Preclude Admission of Self-Serving Hearsay to include the following portions of Defendant Cary Barfield's recorded statement:²

Page 5, line 24, beginning with "I don't" through page 6, line 6;
Page 9, lines 9-19;
Page 10, lines 4-11;

² The Court's ruling is intended to address Defendant Cary Barfield's statements contained in the cited portions of the transcript. The Court is not precluding reference to the officer's questions posed to Defendant Cary Barfield for purposes of this ruling.

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Page 11, lines 22-25 and page 12, lines 1-6;
Page 13, lines 2-25;
Page 14, lines 1-25;
Page 15, lines 1-25;
Page 16, lines 1-25³;
Page 17, lines 1-25⁴;
Page 18, lines 1-19; and
Page 21, lines 10-17.

State's Motion in Limine Regarding Defendant Cary Barfield's Recorded Statement

The State seeks to preclude Defendant Cary Barfield from introducing certain statements regarding co-defendant Adam Barfield's incarceration. The State further seeks to preclude reference to the fact that Cary Barfield's statements were audio recorded.

The Court finds no basis to preclude reference to the fact that Cary Barfield's statements were audio recorded. The jury will be instructed as to the evidence that can be considered and they are presumed to follow the Court's instructions. The State is not required to play the audio recording but the Court finds no reason to preclude reference to it or to prevent the Defendants from offering portions of the audio recorded statement to the extent that portions of the recording may be offered for a relevant purpose such as described above or below.

IT IS ORDERED denying the State's Motion in Limine to preclude reference to the recorded statement.

The Court finds that statements related to the basis for Adam Barfield's prison sentence or the duration of that sentence are extremely prejudicial to Adam Barfield and provide little probative value. The parties have stipulated to redact from Cary Barfield's recorded statement those portions which reference the nature and duration of the prison sentence. Under Rule 403 of the Arizona Rules of Evidence, the Court finds that reference to the nature and length of Adam Barfield's prison sentence would result in undue prejudice that substantially outweighs any probative value.

³ The portion of the statement at lines 6-13 is also prejudicial and lacks relevance to the extent the subject of Defendant Cary Barfield's family is addressed. *See* Rule 401 (lack of relevance) and 403 (waste of time; confusing the issues).

⁴ The portion of the statement at lines 4-14 is also prejudicial and lacks relevance to the extent the subject of Defendant Cary Barfield's family is addressed. *See* Rule 401 (lack of relevance) and 403 (waste of time; confusing the issues).

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IT IS ORDERED granting the State's Motion to preclude any statements by Cary Barfield as to the nature and length of Adam Barfield's prison sentence.

IT IS FURTHER ORDERED the statement of Cary Barfield (whether offered in the form of a transcript or audio) shall be redacted as follows:⁵

Page 2 at lines 1-4;
Page 10 at lines 12-16;
Page 20 at lines 20-23; and
Page 24 at lines 16-18.

Upon review, and for the reasons set forth above, the Court concludes that additional portions of the statement should be redacted to avoid any undue prejudice associated with Adam Barfield's incarceration:

Page 21, lines 18 through 25 and Page 22 line 17; and
Page 22, line 18 through Page 23, line 10.

The Court finds the above portions of the interview include references to whether funds were provided by Cary Barfield to someone other than Adam Barfield which implicates Rule 404(b) of the Arizona Rules of Evidence. Additionally, the transcript includes references to Adam Barfield's gambling debt and his restitution related to the prison sentence. While the use of funds related to gambling and restitution may be probative to the extent the evidence is relevant to motive, the probative value is substantially outweighed by the danger of unfair prejudice. *See* Rule 403.

Stipulated Redactions to Cary Barfield's Statement

The parties agree that the following portions of Cary Barfield's Statement should be redacted:

Page 11 at lines 1-21.

IT IS ORDERED the following portions of Cary Barfield's interview shall be redacted:
Page 11 at lines 1-21.

Rule 401 and 403

⁵ The Court notes that the parties stipulated to these redactions.
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Defendant Cary Barfield's recorded statement contains one officer's summary of the interview with Cary Barfield and numerous statements about cell phones in prison which have no identified relevance to this case. The officer's summary of Cary Barfield's statement is not particularly probative or complete and, in the absence of reviewing the entirety of the statement, it may serve to mislead the jury. Additionally, presenting the officer's summary of the interview to the jury is likely to result in a waste of time and confusion for the jury. Any probative value of the officer's summary is substantially outweighed by the danger of unfair prejudice, wasting time, and confusion. *See* Rule 401 and 403.

IT IS ORDERED the following portions of Cary Barfield's interview shall be redacted: Page 25 at line 5 through Page 26 at line 4.

Bruton

The Court has further considered whether Defendant Cary Barfield's statements to the police implicate any of the other Defendants. To the extent his statements implicate the other Defendants, the Court has further considered whether the statement can be redacted or otherwise sanitized to preclude any reference to the other Defendants so as not to violate *Bruton* and its progeny. *See Bruton v. United States*, 391 U.S. 123 (1968); *Richardson v. Marsh*, 481 U.S. 200 (1987); *Gray v. Maryland*, 523 U.S. 185 (1998) and *State v. Herrera*, 174 Ariz. 387 (1993). The Court concludes that redactions are appropriate in some instances in which the Court finds that a statement cannot not be sanitized to avoid prompting an immediate inference, independent of the presentation of any evidence at trial, that the sanitized name was a co-defendant. Accordingly,

IT IS ORDERED the introduction of Defendant Cary Barfield's interview shall be redacted and/or sanitized as follows:⁶

Redactions:

Page 3 at lines 5-7;

Page 3 at line 12, redact "He asks";

Page 3 at lines 20-25 through page 4, line 1;

Page 4 at line 7 redact "and then Stephen and that's it.";

Page 4 at line 9, redact "That was - - . . ." through page 4, line 24;

Page 5 at line 2-5;

⁶ The Court conducted an independent review of the transcript and identified statements that could be considered to implicate one or more of the other Defendants. Upon consideration of the concerns identified in *Bruton* and its progeny, the Court has exercised its discretion to include additional redactions to eliminate or sanitize statements that serve to implicate one or more of the other Defendants.

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Page 5 at lines 6-18;
Page 6 at lines 12-16;
Page 10 at lines 17-25;
Page 12 at lines 15-18;
Page 12 at lines 19-22;
Page 13 at line 1, redact “and he says he doesn’t work at the club anymore.”;
Page 18 at line 20-23;
Page 24 at line 19, redact “Does he know”;
Page 24 at line 20, redact “he’s the one who told me.”;
Page 24 at line 21-22; and
Page 25 at line 4, redact “he told me it was on the news.”

Sanitized Statements

Page 7 at line 2, delete “Pauly” and insert “someone”;
Page 7 at line 4, delete “he” and insert “that person”;
Page 9 at line 22, delete “Pauly’s” and insert “someone’s”;
Page 10 at line 1, delete “Pauly” and insert “that person”;
Page 10 at line 2, delete “he” and insert “the person”;
Page 10, line 3, delete “his” and insert “the”; and
Page 19 at line 23, delete “Pauly” and insert “someone”.

IT IS FURTHER ORDERED any portions of Cary Barfield’s statement that contain deletions or sanitized words, shall be presented to the jury in the form of a written transcript as the audio cannot be appropriately sanitized.

IT IS FURTHER ORDERED the Court shall provide a limiting instruction to the jury that Defendant Cary Barfield’s statements from his interview are only to be used against him.

IT IS FURTHER ORDERED an unredacted copy of the audio recording and transcript shall be filed along with this minute entry.

As the Court obtained the transcript of Cary Barfield’s interview, the Court will make available to the parties a redacted/sanitized transcript consistent with the orders set forth above.

Defendant Adam Barfield filed a Motion in Limine to preclude all references to his incarceration. The Court notes that the pending motion is not yet under advisement or ripe for ruling. The Court may supplement the above orders in the event that the pending motion is granted in whole or in part.